IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:26-11-2004

CORAM:

THE HONOURABLE MR.JUSTICE M.KARPAGAVINAYAGAM
AND
THE HONOURABLE MR.JUSTICE C. NAGAPPAN

A.S.No.606 of 1990

Nazir Maricar .. Appellant/Defendant

vs.

M/s. Marshalls Sons & Co.
(India) Limited,
33-A, Jawaharlal Nehru Road,
Calcutta-700 071. .. Respondent/Plaintiff

Appeal against the judgment and decree dated 21.7.1989 in O.S.No.8239 of 1985 on the file of the VIII Assistant Judge, City Civil Court, Madras.

For appellant : Mr. N.G.R. Prasad for
M/s. Row and Reddy

For respondent: Mr. Kamalanathan

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JUDGMENT
M.KARPAGAVINAYAGAM, J.

Nazir Maricar, the defendant in the suit has filed this appeal challenging the judgment and decree passed in favour of M/s. Marshall Sons and Company (India) Limited, Calcutta, the plaintiff, the respondent herein, directing the defendant/appellant to pay damages of Rs.30,000/- to the plaintiff/respondent.

2. The plaintiff, the respondent herein filed a suit seeking for the relief of damages to the tune of Rs.30,000/- with interest and for permanent injunction restraining the defendant from in any manner directly or indirectly employing himself with any other person and not to divulge or disclose or

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in any way making use any of the technical details, designs of the plaintiff to any other person.

3. The case of the plaintiff, in short, is as follows:

"The plaintiff Company was engaged in the manufacture of sophisticated construction and road making machinery. The defendant was employed in the year 1978 as Production Engineer. Since the Company was manufacturing sophisticated machines of exclusive design with foreign collaboration, the Company decided to depute some of its employees to proceed to West Germany for training. The defendant, one of the employees, was selected for training. So, an agreement was entered into on 18.9.1982 by which the Company agreed to meet the expenses of the defendant in the foreign country and the defendant after getting training agreed to serve the said Company for a period of five years after his return from the foreign training. As per the agreement, in case the defendant committed breach of agreement by going out of the Company before the expiry of five years, he is liable to pay liquidated damages of Rs.30,000/-. As agreed by the parties, the defendant was sent abroad by the Company at its cost and all the expenses of the defendant were met by the Company. After taking 25 days training, the defendant returned to India and joined duty on 23.10.1982. Thereafter, he was given due promotion. After some months, the defendant sent a letter of resignation on 9.4.1985. He sent another letter dated 13.5.1985 stating that he would not be reporting to work from 14.5.1985 as he already sent resignation letter. The plaintiff reminded him of the terms of the agreement. However, the defendant did not turn up for work from 14.5.1985. On 30.7.1985, the plaintiff issued notice calling upon the defendant to pay damages as agreed by him in the agreement dated 18.9.1982. He sent a reply dated 13.8.1985 containing unsustainable particulars. The plaintiff spent an amount of Rs.10,874/- towards travel and Rs.24,022/- towards expenses in the foreign country for training. This was done only with an expectation that the defendant's knowledge and training would be utilized for the Company and he would serve the plaintiff for a period of five years after training. After training, he worked from 23.10.1982 till 13.5.1985 nearly for 18 months only. As per the agreement, he has to work up to 22.10.1987. The defendant after resignation is trying to get employed under the plaintiff's competitor for using his knowledge acquired in the training given by the Company. Hence, the plaintiff filed the suit for recovery of damages of Rs.30,000/- and also for permanent injunction."

4. The case of the defendant is as follows:-

"The agreement dated 18.9.1982 is not enforceable as the clause about liquidated damages for the sum of Rs.30,000/- was not voluntarily agreed to. Section 27 of the Contract Indian

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Act makes such an agreement void. Taking advantage of the five years bondage, the defendant was subjected to unfair labour practice. Though the defendant was promoted after training, he was not given due salary. On the other hand, his juniors were promoted and they were sent to foreign countries. Thereafter, more salaries were given to them. Therefore, he sent the resignation letter on 9.4.1985 and again on 13.5.1985, he sent an intimation that he would not be reporting for work from 14.5.1985. Even assuming that there is an enforceable agreement providing for a stipulated damage, the plaintiff has to prove the actual quantum of the damages. Therefore, the suit is liable to be dismissed."

5. Upon the above pleadings, the necessary issues were framed. On the side of the plaintiff, during the course of trial, P.W.1 and P.W.2 were examined, Exs.A1 to A25 were marked. The defendant examined himself as D.W.1 and on his side, Exs.B1 to B9 were marked.

6. The trial Court ultimately, though rejected the relief in respect of permanent injunction, granted the decree for damages for a sum of Rs.30,000/- with interest at 12% from the date of the suit till realisation. This is the subject matter of challenge in this appeal.

7. Mr.N.G.R.Prasad, learned counsel for the appellant, would elaborate his arguments on two-fold contentions:

(1)The agreement in question dated 18.9.1982 which puts a negative restriction on the exercise of the right of lawful profession of the defendant, is void as per Section 27 of the Indian Contract Act, 1872 (hereinafter referred to as 'the Act'). Since the object of the said agreement is not lawful, the same is void as per Section 23 of the Act.

(2) In the absence of the material relating to the extent of loss or damage caused to the Company, the fixing of Rs.30,000/- which is a maximum towards the liquidated damages is arbitrary.

8. In reply to the said submissions, Mr.Kamalanathan, learned counsel for the respondent, would submit that both the sections, namely 23 and 27 would not apply to the present facts of the case as the agreement would not put restriction on the employee in respect of the period of post service, but it is a reasonable restriction on the employee by fixing the damages to compensate the loss to the Company and as such, the trial Court correctly fixed the quantum as mentioned in the agreement.

9. Both the counsel would cite a number of authorities.

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10. We have considered the submissions made by the counsel for the parties and gone through the judgment impugned and also perused the documents.

11. The points that arise for consideration in this appeal are as follows:

(i) Whether the agreement dated 18.9.1982 is enforceable in the light of the bar under Sections 23 and 27 of the Act?

(ii) Whether the quantum of damages fixed by the trial Court is appropriate or not?

12. Let us now take the first question relating to the voidability of the agreement.

13. The undisputed facts are these:

"The defendant joined the Company in 1978 as a Production Manager. By the agreement dated 18.9.1982, the Company agreed to send him to West Germany for undergoing training by meeting all his expenses and similarly, the defendant agreed to serve the Company for a period of five years from the date of joining the Company after his return from his foreign training. He underwent training from 20.9.1982 to 15.10.1982 in West Germany. Towards the travel expenses and the expenses incurred by the defendant in the foreign country, the Company spent more than Rs.30,000/-. The defendant returned to India and joined duty on 23.10.1982. As per the agreement, his five years would expire only on 22.10.1987. But, he sent resignation on 9.4.1985 and stopped reporting for work from 14.5.1985. Thus, instead of five years, he worked only for 18 months."

14. As the first contention,it is strenuously argued that the agreement is not voluntary and unenforceable under law. In our view, there is no basis for this contention. The evidence oral and documentary adduced by the plaintiff would not indicate that under any circumstantial compulsion, the defendant signed the agreement. In fact, the agreement was signed on 18.9.1982 by way of giving guarantee. The defendant proposed his father as guarantor for the due performance of the agreement dated 18.9.1982. Accordingly, another agreement was entered into between the Company and his father. The said agreement would show that the defendant guaranteed the Company for the due performance of the terms of the agreement.

15. As indicated above, he left India and underwent training in September 1982 and October 1982 and at the end of October, 1982, he rejoined duty. He sent resignation within 18 months, i.e. on 9.4.1985. Thereafter, he sent another letter dated 13.5.1985 intimating that he would not be reporting for work from 14.5.1985. Till then, the defendant had not chosen to

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whisper anything to the Company orally or in writing about the circumstantial compulsion or that the agreement was not voluntary. Though in the evidence, the defendant stated that the said agreement was out of the circumstantial compulsion under which he was made to sign, there is no material produced for the same. As a matter of fact, this plea was never taken even in the written statement.

16. The learned counsel for the appellant having perceived difficulty in arguing the matter on the ground of circumstantial compulsion, would confine himself to the alternative argument to the effect that the agreement is void and as such, the defendant is not liable to pay damages. To substantiate his plea, he cited two judgments in SUPERINTENDENCE CO. OF INDIA (P) LTD. v. SH. KRISHAN MURGAI (1981(I) L.L.J.121) and CENTRAL INLAND WATER TRANSPORT CORPORATION LTD. v. BROJO NATH (A.I.R.1986 S.C.1571).

17. 1981(I) L.L.J.121 relates to Section 27 and A.I.R.1986 S.C.1571 is with reference to Section 23 of the Act.

18. The relevant portions relied upon by the counsel for the appellant in 1981(I) L.L.J.121 (supra) dealing with Section 27 are as follows:

> "A contract in restraint of trade is one by which a party restricts his future liberty to carry on his trade, business or profession in such manner and with such persons as he chooses. A contract of this class is *prima facie* void. ..... If the agreement on the part of the respondent puts a restraint even though partial, it is void, and, therefore, the contract must be treated as one which cannot be enforced. .... The restraint may not be greater than necessary to protect the employer, nor unduly harsh and oppressive to the employee."

19. While dealing with Section 23 of the Act, the following observation was made by the Supreme Court in A.I.R.1986 S.C.1571 (supra):

> "Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience declare such practice to be opposed to public policy."

20. Let us now first deal with Section 27 of the Act, which provides thus:

> "Agreement in restraint of trade, void--Every agreement by which anyone is restrained from exercising

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a lawful profession, trade or business of any kind, is to that extent void."

21. As held in 1981(I) L.L.J.121, the words 'restraint from exercising a lawful profession, trade or business' do not mean an absolute restriction and they are intended also to apply to a partial restriction. It is true that if the agreement on the part of the employer puts a restriction on the employee even though partial, it is void and therefore, the contract must be treated as one which cannot be enforced. But, it must be borne in mind that only when the contract in restraint of trade is construed to be one by which a party restricts his future liberty to carry on his trade or business or profession in such manner and with such persons as he chooses, the said contract is *prima facie* void. However, the contract will become binding upon proof that the restriction is justifiable in the circumstances as being reasonable from the point of view of the parties themselves.

22. In the light of the above legal situation, we shall now look into the negative covenant incorporated in the agreement Ex.A5 dated 18.9.1982, which is as follows:

"(2) That in pursuance of the aforesaid agreement and in consideration of the said company's agreement, the Employee hereby agrees, undertakes and covenants with the said company as follows:

(a) .....

(b) .....

(c) That after completing the said training in the foreign country (or such extended or enlarged time as the foreign firm, undertaking or the company may deem fit and expedient), the employee voluntarily undertakes, covenants and agrees to return to India and serve the said company for a minimum term of five years calculated from the date of his resuming duties in the company's business in India soon after his return from the foreign training."

23. This clause would not restrict the defendant's future liberty to carry on his trade, business or profession in such manner and with such persons as he chooses. The clause 2(e) would provide thus:

"That the Employee shall also indemnify and compensate the said company against all loses and injuries resulting from the breach of any covenant hereto by the Employee besides paying a liquidated damages of Rs.30,000/-."

24. The reading of the above clause would indicate that in the event of breach of any covenant which resulted in the loss and injuries caused to the company, the employee shall pay liquidated damages of Rs.30,000/-. As such, this does not

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prevent the employee from coming out of the Company or to join some other Company for the future prospects and the only requirement is that the defendant, the employee has to compensate the loss or injuries suffered by the Company because of his leaving the Company before expiry of the five years period as agreed by the parties.

25. In this context, the observation of the Supreme Court in 1981 (I) L.L.J.121 cited by the counsel for the appellant himself, would be quite relevant. The same is as follows:

> "There may be restraint, but that should not be greater than necessary to protect the employer".

26. In this case, there is no dispute in the fact that the Company, the employer incurred expenditure towards the travel to West Germany and towards the expenses spent on the defendant for his stay, food, etc. Similarly, the employer had the benefits of the service of the employee who acquired the knowledge and training in the particular field only for 18 months and he would be deprived of getting his service for other 42 months. Therefore, it is clear that the employer would be entitled to claim damages for the loss caused to the Company. As such, this negative covenant cannot be said to be restraint of trade as contemplated under Section 27 of the Act.

27. At this juncture, it would be worthwhile to refer to some of the observations made by the Supreme Court in NIRANJAN SHANKAR GOLIKARI v. CENTURY SPINNING AND MANUFACTURING CO. LTD. (1967(I) L.L.J.740) cited by the counsel for the respondent, which are as follows:

> "The rule now is that restraints whether general or partial may be good if they are reasonable. A restraint upon freedom of contract must be shown to be reasonably necessary for the purpose of freedom of trade.
>
> Considerations against restrictive covenants are different in cases where the restriction is to apply during the period after the termination of the contract than those in cases where it is to operate during the period of the contract. Negative covenants operative during the period of the contract of employment when the employee is bound to serve his employer exclusively are generally not regarded as restraint of trade and, therefore, do not fall under Section 27 of the Contract Act."

28. These observations of the Supreme Court would squarely apply to this case as the condition regarding the payment of damages in the event of loss during the period of a contract of employment cannot at all be construed to be restraint of trade.

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29. Further, it is to be noticed that the plaintiff's claim is by way of liquidated damages in respect of breach of the agreed terms by the employee on the ground that all the essential conditions put on the employer through the agreement have been fulfilled to entitle the plaintiff to enforce Ex.A5 agreement dated 18.9.1982.

30. The counsel for the appellant would cite A.I.R.1986 S.C.1571 (supra) indicating that the agreement is void as per Section 23 of the Act. This argument has to be rejected in toto in view of the fact that Section 23 would deal with situation where the agreement was entered into between the parties in respect of anything which is opposed to public policy. Section 23 of the Act reads thus:

> "The consideration or object of an agreement is lawful, unless--
>
> It is forbidden by law; or
>
> is of such nature that, if permitted it would defeat the provisions of any law or is fraudulent; or
>
> involves or implies, injury to the person or property of another; or
>
> the Court regards it as immoral, or opposed to public policy.
>
> In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

As per the above section, if the consideration or object of an agreement is unlawful and it is opposed to public policy, then the agreement becomes void.

31. Admittedly, there is nothing to indicate that object of agreement is unlawful or opposed to public policy, especially when there is no prohibition put on the employee from coming out of the company and on the other hand, the Company to protect its interest claims only compensation as agreed by the parties to make good the loss sustained by the Company.

32. Let us now come to the second issue relating to the quantum of damages.

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33. Before dealing with this question, it would be relevant to quote Section 74 of the Act, which reads thus:

> "When a contract has been broken, if a sum is named in the contract as the amount be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or

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loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

By this section, it is provided for the claim of penalty or compensation in the event of contract having been broken by breach of terms even in the absence of loss or damage.

34. But in this case, the plaintiff has proved the loss of service from the defendant. The plaintiff claimed the entire amount of Rs.30,000/- as specified in Ex.A5 and the same was decreed in respect of the entire amount with interest at 12% per annum.

35. The reading of the covenant in the agreement would indicate that Rs.30,000/- is maximum. Admittedly, the defendant has worked for about 18 months after training is over and he has failed to serve, thereby caused loss of service only for the remaining period i.e. 3 years 6 months as per the agreement. Therefore, in our view, the plaintiff, who has received the benefit of trained services from the defendant for 18 months, would be entitled to the proportionate amount of this specified claim in respect of the remaining perio

36. Considering the above situation, it is found reasonable to allow the plaintiff's claim to the extent of Rs.21,000/- after disallowing Rs.9,000/- representing the actual service, the period of 18 months by the defendant.
This amount, in our view, purely represents the substantial part of actual loss suffered by the plaintiff on account of breach of the covenant in the agreement.

37. The counsel for the appellant would, at the end, submit that the interest at 12% p.a. is on the higher side. The suit was filed in the year 1985 and the same has been decreed in 1989. The appeal has been filed in the year 1990 and the same has been pending before this Court for the past 14 years. Therefore, it would be appropriate to reduce the rate of interest from 12% p.a. to 6% p.a. as contemplated under Section 34 C.P.C.

38. Consequently, it is ordered that the plaintiff is entitled to recover a sum of Rs.21,000/- with subsequent interest at the rate of 6% p.a. from the date of filing of the suit till realisation.

39. In the result, the appeal is partly allowed and the decree of the trial Court is modified as indicated

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above. The parties are directed to bear their respective costs.

40. After pronouncement of the judgment, it was represented that the entire amount of Rs.21,000/- has been deposited pursuant to the interim order. So, it will not carry interest subsequent to the deposit of amount.

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Asst.Registrar

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Sub Asst.Registrar

To
1 the Registrar, City Civil court,
Madras

2.The Record Keeper, V.R,.Section
High court, Madras

1 cc to M/s.Row & Reddy, Advocate Sr.51364

1 cc to Mr.M.Kamalanathan, advocate sr 51782

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